IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 34 OF 2003

1. Shri Avelin Silveira,
   Age 34 years,
   Son of Joao Silveira,
   Resident of House No.2090,
   Dabolim, Bagamad,
   Shiroda, Goa.

2. Shri Luis Silveira,
   Age 36 years,
   Son of Joao Silveira,
   Resident of House No.2090,
   Dabolim, Bagamad,
   Shiroda, Goa. ... Appellants.

versus

State,
through Ponda Police Station. ... Respondent.

Mr. S. D. Lotlikar, Senior Advocate with Miss S. Dessai, Advocate for the Appellants.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM: P. V. HARDAS, J.

DATED: 5TH SEPTEMBER, 2003.

ORAL JUDGMENT

The Appellants who are convicted by the IInd

Additional Sessions Judge, Panaji, by Judgment dated 10th March, 2003, in Sessions Case No.61 of 2000 for an offence punishable under Section 326 r/w 34 of the Indian Penal Code and sentenced to undergo Rigorous Imprisonment for 3 years and to pay fine of Rs.5000/- each, in default Simple Imprisonment for 2 months, have filed the present Appeal challenging the conviction and sentence.

2. The facts as are necessary for the decision of the Appeal are stated hereunder:-

On 20th January, 1998, P.W.10, Laxman Chawan, was on duty at the Ponda Police Station. At 6.15 p.m., P.W.1, Piedade Silveira, came to the Ponda Police Station and lodged a complaint at Exh.12. On the same day, one Head Constable Bagilgekar presented the statement of the injured P.W.5, Martin Silveira. On the next day, P.W.10, P.S.I. Laxman Chawan, drew the scene of offence panchanama at Exh.18 in the presence of P.W.2, Ashok Gaonkar. A pair of chappals lying at the scene of the offence, which is on the right hand side of a culvert at Dabolim Shiroda were attached. The pair of chappals is M.O.1. Since, the Appellants/Accused are alleged to have been absconding, Accused No.1 came to be arrested on 16th February, 1998. On 19th February, 1998, the house search

panchanama of the house of the Accused at Exh.31 was drawn in the presence of P.W.8, Narayan Naik. An axe which was found in the kitchen came to be attached. Meanwhile, P.W.5, Martin Silveira, who had been admitted in the Goa Medical College was examined by P.W.7, Dr, Shivanand Bandekar, who found (1) compound fracture tibia fabula of the right leg, (2) compound fracture tibia fabula of the left leg, (3) closed fracture proximal phalanx of the middle finger of the right hand. The Hurt Certificate of P.W.5, Martin Silveira is at Exh. 28. After completion of the investigation, a charge-sheet against the Appellants/Accused came to be filed.

3. On committal of the case to the Court of Sessions, the IInd Additional Sessions Judge, Panaji, vide Exh.8 framed a charge against the Appellants/Accused for an offence punishable under Section 307 r/w 34 of the Indian Penal Code. Both the Appellants/Accused pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 10 witnesses. The defence of the Appellants/Accused was that a false case was filed against them at the instance of the Complainant. The Appellants/Accused examined two defence witnesses in their defence namely D.W.1, Christa Silveira, sister of the Accused and D.W.2, Laxman Gaude, a photographer. The learned Trial

Court on consideration of the evidence adduced by the prosecution convicted and sentenced the Appellants/Accused as aforestated.

4. The Complainant, P.W.1, Piedade Silveira, states that the Appellants/Accused are the paternal cousins of her husband P.W.5, Martin Silveira. On 19th January, she had sent P.W.5, Martin Silveira, to bring a match box. After some time, she heard the shouts of her husband. Accordingly, she along with her son Poly Silveira and her daughter, P.W.3, Ludovina Silveira rushed towards the place from where she had heard the shouts of her husband. She saw that near the culvert by the side of the road Accused No.1 was armed with an axe and the other Accused was armed with an iron rod and both the Appellants/Accused were assaulting her husband who had fallen down. Her husband, P.W.5, Martin Silveira, had sustained injuries on both the legs and had an injury on his head. She intervened and lay on her husband to protect him from further assault. Meanwhile, a bus stopped there and people gathered. A jeep belonging to P.W.4, Gurunath Naik, was brought and P.W.5, Martin Silveira, was taken to Shiroda Hospital. She along with her son accompanied P.W.5, Martin Silveira to the hospital. The doctor from Shiroda Hospital directed that P.W.5, Martin Silveira, be taken to Goa Medical College. Accordingly, P.W.5, Martin

Silveira, was taken to the Goa Medical College. On the next day evening, she lodged a complaint at the Ponda Police Station vide Exh.12. According to her, land adjacent to her house was purchased by P.W.5, Martin Silveira and because of that, the Appellants/Accused who were the cousins of P.W.5, Martin Silveira, were on enemical terms. In the cross-examination, she has admitted that the doctor attending on P.W.5, Martin Silveira, did not tell her to lodge a complaint. The doctor had also not told her that there was a Police Out-Post at the Goa Medical College. An omission was brought out that she had not stated that her son Poly Silveira and daughter P.W.3, Ludovina Silveira had accompanied her when she had rushed to the scene of the offence. An omission was also brought out that she had not stated in her complaint that P.W.5, Martin Silveira, had sustained injuries on his head. Similarly, an omission was brought out that she lay on her husband to protect him from further assault. An omission was also brought out regarding the arrival of the bus. She has denied the suggestion that she had not witnessed the incident. She has also admitted that she was not on talking terms with the Appellants/Accused since the incident. She has also admitted that the culvert cannot be seen from her house because there are trees inbetween.

5. P.W.3, Ludovina Silveira, states that on 19th January, 1998, her father P.W.5, Martin Silveira, had gone to a shop. Her mother P.W.1, Piedade Silveira and her brother Poly Silveira were at the house. Her brother Poly Silveira came and informed her that P.W.5, Martin Silveira, was shouting. She followed her mother P.W.1, Piedade Silveira to the scene of the incident which was at a distance of 30 metres from their house. She states that she saw both the Appellants/Accused assaulting her father P.W.5, Martin Silveira. Accused No.1 was armed with an iron rod whereas Accused No.2 had an axe. On seeing them, the Appellants/Accused ran away. In the cross-examination, an omission was brought out that she had not stated in her statement that her mother P.W.1, Piedade Silveira and brother Poly Silveira were at home and that her father had gone to some shop. An omission was also brought out that she had not stated in her statement that her brother Poly Silveira came and informed her that P.W.5, Martin Silveira, was shouting. She has admitted not to have stated in her statement that the culvert is at a distance of 30 metres from her house. An omission was brought out about P.W.5, Martin Silveira, shouting while being assaulted. An omission was brought out regarding the existence of an electric pole with a bulb on the culvert. She has denied that both the

Appellants/Accused did not assault her father with an iron rod and an axe.

6. P.W.5, Martin Silveira, states that on the day of the incident, he was going to the shop for purchasing a match box. When he reached near a culvert which is about 30 to 40 metres from his house, both the Appellants/Accused came from either side and questioned him whether he wanted to purchase property. Accused No.1 was armed with iron rod and Accused No.2 was armed with an axe. Both the Appellants/Accused stood infront of him and Accused No.2 hit him with the sharp edge of the axe on his right leg near the ankle and also on the left leg. Accused No.2 also dealt a blow on his stomach. Accused No.1 hit him with an iron rod and on the left side of the head above the ear. Accused No.1 also hit him with an iron rod on the palm of right hand which resulted in the fracture of the finger. He had shouted and on hearing his shouts, his wife P.W.1, Piedade Silveira and his children Poly Silveira and daughter P.W.3, Ludovina Silveira had come to the spot. He was taken to the hospital where he remained for more than a month. According to him, there was an electric bulb on the pole which was on the side of the culvert and, therefore, he could see the incident in the light of the said bulb. According to him, because he had purchased the property adjacent to his house, the

Appellants/Accused were on enemical terms with him. In the cross-examination, he has admitted that the distance between his house and the culvert may be more than 100 metres. He has denied the suggestion that because of the trees the culvert is not visible from his house. An omission was brought out regarding the Appellants/Accused questioning him whether he wanted to purchase property. A contradiction was brought out in respect of Accused No.1 being armed with an iron patti. An omission was also brought out regarding the Appellants/Accused coming from either side of the culvert. An omission was brought out regarding the specific mention of Accused No.2 hitting him on the ankle and the stomach with the axe. An omission was brought out in respect of Accused No.1 hitting him specifically on stomach and on both the legs. An omission was also brought out in respect of the existence of the electric pole with a bulb. He denied the suggestion that the Appellants/Accused have not assaulted him.

7. P.W.4, Gurunath Naik, states that P.W.3, Ludovina Silveira, had come to his house and had told her that her father was injured and was required to be taken to a hospital. He took his jeep to the scene of the incident and took P.W.5, Martin Silveira to the

hospital at Shiroda and thereafter, to the Goa Medical College.

8. P.W.9, Josephine Silveira, states that she knows both the Appellants/Accused as they are her neighbours. P.W.5, Martin Silveira, is also her neighbour. On 19th January, 1998, at about 8 p.m., she heard some noise near the culvert and, therefore, came to the road. She saw both the Appellants/Accused running in the direction of their house and both the Appellants/Accused were holding something in their hands. At the culvert, she saw P.W.5, Martin Silveira, with bleeding injuries all over the body. People had gathered at the scene and were preparing to take P.W.5, Martin Silveira to the hospital. She denied the suggestion that she had not seen the Appellants/Accused running with something in their hands.

9. D.W.1, Christa Silveira, sister of the Appellants/Accused states that there are big trees on either side of the road. The house of P.W.1, Piedade Silveira, is about 100 metres from the house of the Appellants/Accused. According to her, on 19th January, 1998, Accused No.2 had come to her house as she had invited him. They had dinner in their house and were present in her house till 10 p.m. They had stayed over night in her house. She states that she does not know

where Accused No.1 was on 19th January, 1998. She denied the suggestion that she being the sister of the Appellants/Accused, she was deposing falsely in their favour.

10. D.W.2, Laxman Gaude, is a photographer who has produced the photographs at Exh.40 colly.

11. Mr. S. D. Lotlikar, learned Senior Counsel appearing on behalf of the Appellants/Accused has submitted that admittedly, the offence had taken place at 8 p.m. on 29th January. Since, there is an omission regarding the electric pole and the bulb, the identification of the Appellants/Accused as the assailants by P.W.5, Martin Silveira, cannot be accepted. He has further urged that the evidence of P.W.1, Piedade Silveira, that she rushed to the scene of the offence on hearing the cries is falsified by the admission of P.W.5, Martin Silveira, that he had shouted after the assault was over. He has also submitted that P.W.3, Ludovina Silveira, had not witnessed the actual incident. He thus submits that the Appellants/Accused are entitled to be given the benefit of doubt as Accused No.2 has established his alibi being at the house of D.W.1, Christa Silveira.

12. Mr. S. N. Sardessai, learned Public

Prosecutor appearing on behalf of the State has submitted that the Appellants/Accused and P.W.5, Martin Silveira are not strangers. In fact, the Appellants/Accused are the cousins of P.W.5, Martin Silveira. Therefore, even if it is held that the existence of the electric pole is rendered doubtful, P.W.5, Martin Silveira, had adequate opportunity of identifying the Appellants/Accused as the assailants. He has further submitted that the evidence of the prosecution witnesses is corroborated by the evidence of P.W.9, Josephine Silveira, who has seen the Appellants/Accused running to their house holding something in their hands. He has also submitted that the plea of alibi of the Accused cannot be believed in the face of overwhelming evidence of the prosecution.

13. P.W.5, Martin Silveira, has no doubt admitted in his cross-examination that he had not stated in his statement that there was an electric pole with a bulb and he was able to identify the incident. However, since the Appellants/Accused and P.W.5, Martin Silveira, Complainant are related and even if it is assumed that there was no electric light, the identification of the Appellants/Accused as the assailants by P.W.5, Martin Silveira, cannot be doubted. This is not a case where the assailants were strangers but the assailants are said to be close

relatives of P.W.5, Martin Silveira. Moreover, there is unimpeachable evidence of P.W.1, Piedade Silveira, that on hearing the shouts of her husband she had gone to the scene of the incident and had seen the Appellants/Accused assaulting her husband. While narrating the sequence of events, no doubt, P.W.5, Martin Silveira, has stated that he had shouted after the Appellants/Accused had assaulted him. This appears to be an error in stating the sequence of events as P.W.1, Piedade Silveira, had categorically stated that on hearing the shouts of her husband, she had rushed to the scene of the offence and had seen the Appellants/Accused actually assaulting her husband. Even if the evidence of P.W.3, Ludovina Silveira, is not taken into consideration, the evidence of P.W.5, Martin Silveira, corroborated by the evidence of P.W.1, Piedade Silveira, establishes beyond any reasonable doubt that the Appellants/Accused were the assailants and have caused the injuries to P.W.5, Martin Silveira. The evidence of alibi is obviously an afterthought and D.W.1, Christa Silveira, has deposed in order to protect her brothers from punishment. P.W.1, Piedade Silveira, has admitted that because of trees, the scene of incident is not visible from her house. Her evidence is not suggestive of the fact that she had witnessed the incident from her house but according to her, she had rushed to the scene of the offence and at

the scene of the offence, she had seen the Appellants/Accused assaulting her husband. Therefore, the evidence of D.W.2, Laxman Gaude, the photographer is of no assistence to the defence in trying to impeach the credibility of P.W.1, Piedade Silveira. There is nothing in the cross-examination to discredit the version of P.W.1, Piedade Silveira and P.W.5, Martin Silveira. Therefore, according to me, the learned Trial Court has correctly appreciated the evidence and has held both the Appellants/Accused guilty of the offence punishable under Section 326 r/w 34 of the Indian Penal Code. P.W.5, Martin Silveira, has suffered grievous injuries and the Appellants/Accused are said to have used deadly weapons like iron rods and axe and as such, are held guilty for an offence punishable under Section 326 of the Indian Penal Code. Therefore, according to me, the conviction of the Appellants/Accused needs no interference.

14. Coming to the sentence, the Appellants/Accused are said to be aged about 27 and 32 years on the date of the incident. No previous conviction against them is alleged. The incident is alleged to have occurred on account of family feud relating to property between them and P.W.5, Martin Silveira. In these circumstances, therefore, according to me, the sentence of 3 years Rigorous Imprisonment is

a harsh sentence and instead a sentence of Rigorous Imprisonment for 1 1/2 years each with the enhancement of fine from Rs.5000/- to Rs.10,000/- would meet the ends of justice.

15. Accordingly, Criminal Appeal No.34 of 2003 is partly allowed. The conviction of the Appellants/Accused for an offence punishable under Section 326 r/w 34 of the Indian Penal Code is maintained and the sentence of Rigorous Imprisonment for 3 years and fine of Rs.5000/-, in default Simple Imprisonment for 2 months is altered to Rigorous Imprisonment for 1 1/2 years each and fine of Rs.10,000/- each, in default Simple Imprisonment for 2 months. The Bail Bonds of the Appellants/Accused stand cancelled. Eight weeks time is granted to the Appellants/Accused to surrender to their bail.

P. V. HARDAS, J.

RD.